Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 88-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CRAIG E. CALDWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION OF PETITIONER TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

*LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
(202) 955-8558

THOMAS E. HOLLIDAY
CHARLES J. STEVENS
GIBSON, DUNN & CRUTCHER
2029 Century Park East
Suite 4000
Los Angeles, CA 90067-3026

Attorneys for Petitioner
**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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MOTION OF PETITIONER TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

This petition is presently on the Conference List for the Court's February 17, 1989 Conference. Petitioner contends, *inter alia*, that the decision below conflicts with the decision of the Sixth Circuit in *Benes* v. *United States*, 276 F.2d 99, 109 (6th Cir. 1960), which held that voluntary action by a criminal defendant to suspend the running of the statute of limitations "does not toll the statute of limitations in a criminal prosecution." The Government has not denied the existence of this conflict in this Court, choosing to avoid that issue by declining to address the merits of this petition.

That a conflict with *Benes* presently exists is undeniable because *Benes* has been applied currently by a District Court in the Sixth Circuit to dismiss indictments based upon essentially the same arguments advanced by petitioner in this Court—that 18 U.S.C. § 3292 does not authorize bilateral arrangements between the Government and the targets of criminal investigations to suspend its limitation on prosecutions. *United States* v. *Del Percio*, 657 F. Supp. 849 (W.D. Mich. 1987). The Government appealed that decision to the Sixth Circuit, which heard oral argument in that appeal on December 7, 1987.

The failure of the Sixth Circuit to decide the *Del Percio* appeal in the more than fourteen months since that appeal was argued is additional evidence that *Benes* conflicts with the decision below and also indicates the substantiality of the questions presented by petitioner in this case. If the Sixth Circuit affirms the dismissal of the indictments in *Del Percio* as

barred by § 3282, it is almost inconceivable that the Solicitor General would not ask this Court to resolve these important questions either in the case at bar or in *Del Percio*.

The Ninth Circuit panel in this case, although it ruled unanimously against petitioner on the basis, in part, of prior precedent in that circuit, granted—and the Government did not oppose—petitioner's motion for stay of that court's mandate. The Government understood that that stay would remain in effect for a potentially lengthy period of time until this Court finally disposes of this case. Petitioner has no reason to believe that an additional delay in this Court's disposition of this petition would prejudice the Government's ability to take this case to trial.

Although petitioner believes that his petition should be granted regardless of the outcome of the Government's appeal in *Del Percio*, petitioner recognizes that the Court may want to assure itself of the Sixth Circuit's adherence to its prior decision in *Benes* prior to calling for a response on the merits from the Government and acting on this petition. Petitioner therefore respectfully moves the Court to defer consideration of his petition until such time as the Sixth Circuit has issued its decision in *Del Percio* and the Government and petitioner have had the opportunity to file briefs in this Court addressing the impact of the Sixth Circuit's decision on the question whether this petition should be granted.

February 14, 1989 Respectfully submitted,

*LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
(202) 955-8558

THOMAS E. HOLLIDAY
CHARLES J. STEVENS
GIBSON, DUNN & CRUTCHER
2029 Century Park East
Los Angeles, CA 90067-3026

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**Counsel of Record*